

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
3 HONORABLE STANLEY BLUMENFELD, JR., U.S. DISTRICT JUDGE
4

5 SANTA CLARITA VALLEY WATER AGENCY,)
6 PLAINTIFF,) CASE NO.
7 vs.) CV 18-06825-SB
8 WHITTAKER CORPORATION, et al.,) VOLUME 13
9 DEFENDANTS.) PAGES 1423 TO 1513
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13 REPORTER'S TRANSCRIPT OF
14 TRIAL DAY 7
15 MONDAY, NOVEMBER 29, 2021
16 1:04 P.M.
17 LOS ANGELES, CALIFORNIA
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1 **MONDAY, NOVEMBER 29, 2021; 1:04 P.M.**

2 **LOS ANGELES, CALIFORNIA**

3 **-oOo-**

4
5 (The following proceedings were held in
6 open court in the presence of the jury:)

7 THE COURT: We remain on the case in the -- on
8 the record in the trial matter with Mr. Alvord who has rejoined
9 us and is on the witness stand.

01:04PM 10 You understand you are under oath, sir?

11 THE WITNESS: I do, Your Honor.

12 THE COURT: We are also in the presence of the
13 jury.

14 Mr. Gee, you may continue with your examination.

01:04PM 15 MR. GEE: Your Honor, that's all I have for now.

16 THE COURT: All right. Mr. Blum?

17 MR. BLUM: Thank you, Your Honor.

18 **MICHAEL ALVORD,**

19 **CALLED BY THE DEFENDANT, WAS PREVIOUSLY SWORN.**

01:04PM 20 **REDIRECT EXAMINATION**

21 BY MR. BLUM:

22 Q Mr. Alvord, the discussion you had with somebody
23 at the DDW where they talked about treatment for VOCs would be
24 helpful, when did that take place?

01:05PM 25 A The actual date I don't recall.

1 Q Can you give me the year?

2 A It was in one of our discussions. It could have
3 been last year or this year.

4 Q Could have been before August of last year?

01:05PM 5 A I just don't recall.

6 Q Okay. Do you recall testifying in August that
7 you had no idea that -- what the remedy would be?

8 A Until we have an actual permit from DDW, we will
9 not know what we're supposed to do.

01:05PM 10 Q So today you don't know if whether or not
11 treatment is going to be required, do you?

12 A No. I don't know if treatment is going to be
13 required, but they said, if it was implemented, we would get a
14 permit quicker.

01:05PM 15 Q Well, you originally said that -- that it would
16 be helpful. What does "helpful" mean?

17 A Helpful, quicker, expedite. Like I said in prior
18 testimony, we have been working with DDW since 2012 to get a
19 permit for this well.

01:06PM 20 Q But I'm interested. Did they use the word
21 "helpful"? Is that their word?

22 A That's just the word that came out of my mouth.
23 I don't know if they used it, if I used it.

24 Q So you don't know if they said helpful or they
01:06PM 25 said it would -- it would make the permit -- you getting your

1 permit quicker? You don't recall what was said?

2 A I just recall discussing with Jeff O'Keefe,
3 Ms. Shu-Fang Orr, and probably Bill Yang, which is another
4 associate of theirs, what the various options would be to
01:06PM 5 expedite a permit, and treatment was one of them.

6 Q Now, was that at one of the technical meetings
7 that's held between all the parties where this discussion took
8 place?

9 A The technical meetings with Whittaker and
01:07PM 10 Department of Toxic Substances Control --

11 Q Yeah.

12 A No.

13 Q Who else was at this meeting?

14 A It could have been on the phone. It could have
01:07PM 15 been with other staff at SCV Water, but it would have only been
16 staff at SCV Water or staff at DDW.

17 Q Now, you don't remember when. You don't remember
18 the year. You don't remember exactly what was said. And you
19 don't remember who was present. Am I correct in that?

01:07PM 20 A I can speculate on who was in meetings because we
21 have typical staff that shows up at these meetings. But yeah.
22 Over the last two, three years that we have been working
23 closely with DDW, I do not recall the actual language that was
24 used or the specific people that were in the meeting.

01:07PM 25 Q And it was never put in writing; correct?

1 A Much of what DDW has told us regarding this has
2 not been in writing.

3 Q Whatever they said, whether it was helpful or
4 whatever, that was not put in writing; correct?

01:08PM

5 A Correct.

6 Q All right. There's other issues that you have
7 with DDW regarding V-201 that have nothing to do with VOCs;
8 correct?

9 A What do you mean by "other issues"?

01:08PM

10 Q Well, didn't -- wasn't one of the things DDW
11 wanted more information on was contaminants in the water that
12 were not VOCs or perchlorate?

13 A So we resolved the secondary contaminant issue
14 with them during one of our many iterations of the 97-005
01:08PM 15 document.

16 Q And when was that?

17 A Well, again, they haven't issued a permit, so I
18 don't know whether or not they're going to make us do anything
19 about it.

01:08PM

20 Q So you don't know if it's been resolved; correct?

21 A Correct.

22 Q So when you said these issues were resolved, that
23 wasn't a correct statement, was it?

24 A Correct.

01:08PM

25 Q All right. Now, I want to discuss with you

1 Exhibit -- if you could put it up, Rick -- 1370.

2 Now, Mr. Alvord, when you testified as the
3 corporate representative on investigations of the turnouts,
4 this is one of the documents you reviewed; correct?

01:09PM

5 A Correct.

6 Q All righty. And this is already in evidence, but
7 let's go to the introduction.

01:09PM

8 Do you see where it says, "PCE is widely used for
9 dry cleaning fabrics, metal degreasing, and other industrial
10 applications. PCE is a common soil and groundwater
11 contaminant."

12 You agree with that statement; right?

13 A Do I agree with it?

14 Q Yeah. Yes.

01:09PM

15 A I agree with the first part, that is, widely used
16 for dry cleaning fabrics, metal degreasing, and other
17 industrial applications. In terms of a common soil and
18 groundwater contaminant, I guess it would have to depend on
19 where the location is. That's a pretty general statement.

01:10PM

20 Q Well, who's the author of this document?

21 A I don't know.

22 Q Isn't it James Leserman?

23 A It could be. I don't know.

01:10PM

24 Q Well, all right. Now, if you go to the second
25 page under paragraph 3, do you see where it says "Responses"?

1 A Yes.

2 Q All right. Now, you talk -- you testified under
3 questioning from Mr. Gee about the response, but I want to go
4 over some of it.

01:10PM 5 Now, it was in April or May of 2012 when the
6 first high readings of PCE were found in SC-1; correct?

7 A That's what it says here, yes.

8 Q And that the immediate conclusion was the SPTF
9 was not the source because the reading was higher than what was
01:10PM 10 found at the turnouts; right?

11 A You paraphrased what that sentence says, yes.

12 Q And I paraphrased it correctly.

13 A I could read it. But it says it was clear that
14 the Saugus wells and the SPTF were not the source.

01:11PM 15 Q The immediate reaction of the agency was to say,
16 well, it's lab error; correct?

17 A I don't know that it said that in here, but that
18 might have been one of the many reasons or one of the many
19 assessments they thought of initially.

01:11PM 20 Q Doesn't it say, quote, "Consequently CLWA staff
21 initially attributed the detections to laboratory or sampling
22 artifacts"?

23 A Yes. That's what the sentence says.

24 Q That means their immediate reaction was it must
01:11PM 25 be lab error or sampling error.

1 A Sounds like the immediate response was that.

2 Q Okay. And at that point this area was already
3 shut down for routine maintenance; correct?

4 A The SC-1 turnout connection was shut down.

01:11PM

5 Q Okay. When that work was completed, wasn't
6 the -- wasn't it put back into service?

7 A Yes. It was pressurized and flushed and sampled.

8 Q Okay. And then for -- between July, August,
9 September, and almost the end of October, PCE was non-detect;

01:12PM

10 is that correct?

11 A That's what it says there, yes.

12 Q Now, between that time, what had the agency done
13 to determine whether or not lab error had actually occurred?

01:12PM

14 A Based on what I'm reading here and based on my
15 recollection is that they must have thought it was just a
16 laboratory or sampling artifact that caused it.

17 Q Well, doesn't it say, if you go to the second
18 paragraph --

19 A Yes. It says it there.

01:12PM

20 Q Doesn't it say right -- well, can you read what
21 it says about that lab error?

22 A It says, "So even though it had not been
23 confirmed that sampling or laboratory artifacts caused the
24 problem, CWLA believed it was no longer an issue because

01:13PM

25 the --"

1 THE COURT: Slow down while you're reading,
2 please.

3 THE WITNESS: I'm sorry.

4 Q BY MR. BLUM: So they thought it was lab error,
01:13PM 5 they didn't confirm that it was, they put it back into service,
6 and after several months what happened?

7 A It was non-detect because the system was now
8 pressurized.

9 Q And subsequent to that, wasn't -- wasn't it
01:13PM 10 subsequently found PCE again spiked?

11 A Yes. When the station was shut down again.

12 Q Okay. And it was after the second spike that
13 they realized, oh, it wasn't lab error.

14 A That's what it says here, yes.

01:13PM 15 Q Okay. So it was only after the -- only after
16 there were hits and several months later there were more hits
17 that an investigation was done to determine what the source
18 was; correct?

19 A The way I read this is that the investigation
01:13PM 20 started in the April and May timeframe in 2012.

21 Q Well, in April or May, it was just blamed on lab
22 error; correct?

23 THE COURT: Mr. Blum, I don't think you need to
24 argue with the witness. It says what it states.

01:14PM 25 Q BY MR. BLUM: Okay. Let's go to the end of it

1 under "Conclusions and Recommendations." Do you see that?
2 It's on page 4.

3 A Yes. Now I do.

4 Q What is the sixth recommendation?

01:14PM 5 A It says, "If a VOC is" -- excuse me. It says,
6 "If a VOC is detected higher than the maximum concentration at
7 Saugus well 1 or Saugus well 2, the turnout shall be taken out
8 of service and another investigation shall be undertaken."

9 Q Was that recommendation followed?

01:14PM 10 A Specifically, I don't know.

11 MR. BLUM: That's all I have, Your Honor.

12 THE COURT: Anything further, Mr. Gee?

13 MR. GEE: No, Your Honor.

14 THE COURT: All right. You are excused,

01:15PM 15 Mr. Alvord. Please watch your step going down.

16 THE WITNESS: Thank you very much.

17 THE COURT: Mr. Blum, your next witness.

18 MR. BLUM: We would call James Leserman,
19 Your Honor.

01:16PM 20 THE CLERK: Good afternoon, sir. Would you
21 please come forward. Sir, would you please walk around and
22 stand up on the witness platform.

23 Please raise your right hand to be sworn.

24 Do you solemnly swear that the testimony you
01:16PM 25 shall give in the cause now before this Court shall be the

1 truth, the whole truth, and nothing but the truth, so help you
2 God?

3 THE WITNESS: I do.

4 THE CLERK: Thank you, sir. Please be seated.

01:16PM 5 Sir, for the record, would you please state your
6 name and spell your last name.

7 THE WITNESS: James Leserman, L-e-s-e-r-m-a-n.

8 THE COURT: And, Mr. Leserman, if you would
9 please remove your mask and make sure that you are speaking
01:16PM 10 into the microphone as you see me doing.

11 THE WITNESS: Okay.

12 THE COURT: Thank you very much.

13 Mr. Blum, whenever you're ready.

14 **JAMES LESERMAN,**

01:16PM 15 **CALLED BY THE DEFENDANT, WAS SWORN.**

16 **DIRECT EXAMINATION**

17 BY MR. BLUM:

18 Q Mr. Leserman, where are you now employed?

19 A The Santa Clarita Valley Water Agency.

01:16PM 20 Q And how long have you worked there?

21 A Worked there for 15 years.

22 Q And what's your current position?

23 A Senior engineer.

24 Q What is a senior engineer?

01:16PM 25 A Performing various engineering type of projects.

1 Q Okay. Sir, as -- what was your position in 2013?

2 A Senior engineer.

3 Q And in 2013, were you tasked with investigating
4 the cause of certain high levels of PCE found at turnout SC-1?

01:17PM

5 A I worked on that project, yes.

6 MR. BLUM: Okay. Can we see Exhibit 1370,
7 please.

8 Q Sir, do you recognize Exhibit 1370?

9 A I do.

01:17PM

10 Q You're the author of it; correct?

11 A That's correct.

12 Q And prior to finishing it, did you believe what
13 you stated in it was true and correct?

14 A I believed what I said at the time.

01:17PM

15 Q Okay. Now, if we can go to page 4, do you see
16 under paragraph 4 where it says, "Conclusions and
17 Recommendations"?

18 A Yes.

19 Q What was the purpose of including a section on
20 conclusions and recommendations?

01:18PM

21 A It's a standard component of a technical memo.

22 Q In other words, you didn't want what happened
23 that you were investigating to happen again; correct? Let me
24 rephrase the question.

01:18PM

25 THE COURT: Are you referring to the reason why

1 he put conclusions and recommendations, or is this more general
2 now?

3 MR. BLUM: Let me rephrase it, Your Honor.

4 THE COURT: All right.

01:18PM 5 Q BY MR. BLUM: Mr. Leserman, the reason there are
6 specific conclusions and recommendations in this report was
7 because you wanted to take the lessons you learned as a result
8 of doing the report and see what changes could be made so that
9 the water agency could better operate.

01:19PM 10 A We were investigating a specific problem here
11 which was an increased level of contamination that we weren't
12 expecting. And this report dealt with that particular issue.
13 And certainly we were hoping to resolve it.

14 Q Were you also hoping to make sure the problem
01:19PM 15 didn't happen again?

16 A By resolving it.

17 Q Well, can you look at conclusion and
18 recommendation No. 6? Now, you don't know -- so this was just
19 read by Mr. Alvord, so we don't have to read it again.

01:19PM 20 Why was that recommendation in there?

21 A So that, if there was a repeat of this situation,
22 we would investigate again to see what the problem might be.

23 Q And what you were recommending was that anytime
24 the readings of VOCs at the turnouts were greater than the
01:20PM 25 readings of the VOCs at either Saugus 1 or Saugus 2, that the

1 turnout should be shut down and another investigation should be
2 undertaken; correct?

3 A Well, it depends. There are circumstances where
4 there could be unusual results that might be related to
01:20PM 5 something else. So we certainly would want to have a
6 confirmation type sample and not necessarily one isolated
7 event.

8 Q Well, where do you say, before you shut it down,
9 do a confirmatory sample?

01:20PM 10 A It's not stated in this particular report.

11 Q Is the reason why you stated that, if it's
12 larger, the numbers are greater at the turnouts than they were
13 at the Saugus -- either Saugus wells for any VOCs was because,
14 if they're greater at the turnouts, it means the Saugus 1 or
01:21PM 15 Saugus 2 wells can't be the source?

16 A That would be the logic behind it.

17 Q Okay. All right. Thank you.

18 Now, was -- did the agency adopt a policy
19 identical to what you recommended in No. 6?

01:21PM 20 A That was taken care of by our operations group,
21 so I'm not able to tell you.

22 Q That would be the operations group headed by
23 Mr. Alvord; correct?

24 A It's the operations group. Now, at the time it
01:22PM 25 was overseen by somebody else.

1 Q Now, since -- this report was written in March of
2 2013; correct?

3 A Yes.

4 Q Since March of 2013, has the -- has any
01:22PM 5 concentration at any of the turnouts ever been higher than
6 the -- any of the VOC ratings at either Saugus 1 or Saugus 2?

7 A I understand that there has been at least one
8 occasion where there was an incident in which it was higher.

9 Q And in that incident, was the turnouts -- was
01:22PM 10 that turnout shut down and an investigation of the source
11 commenced?

12 A Again, I'm not involved in operations, so I can't
13 tell you.

14 MR. BLUM: All right. Before we leave the
01:22PM 15 document, can we go to the first page, please?

16 Q Now, do you see under "Introduction and
17 Background," the first paragraph?

18 A Yes.

19 Q Okay. You state, "PCE is widely used for dry
01:23PM 20 cleaning fabrics, metal degreasing, and other industrial
21 applications." And then you go on to say, "PCE is a common
22 soil and groundwater contaminant."

23 That's a correct statement, is it not?

24 A I believe it's correct.

01:23PM 25 Q In fact, your belief was that the most likely

1 source of the contamination was leaking PCE from Flamingo Dry
2 Cleaners; correct?

3 A Flamingo is close by. I believe it's about
4 200 yards from the turnout where the connection was. It's
01:23PM 5 certainly a distinct possibility, but I wouldn't -- I can't
6 conclude. I don't have the tools or the expertise to know that
7 as a certainty. It seems possible.

8 Q Was it the most likely source?

9 A I don't know.

01:24PM 10 Q Okay. Now, sir, I apologize. There is one other
11 question.

12 On page 2 under "Responses," when the -- when the
13 concentrations of PCE was first discovered, isn't it correct
14 that the initial conclusion was that it was the result of lab
01:24PM 15 error?

16 A No.

17 Q Well, don't you say -- doesn't it say that CLWA
18 staff initially attributed the detections to laboratory or
19 sampling artifacts?

01:24PM 20 A Attributing, which perhaps is a possibility, is,
21 in my view, not the same thing as concluding. That was the
22 source. It's a possibility. It's a common one along with
23 sampling error, other human error that can cause inaccuracies
24 in laboratory results.

01:25PM 25 Q Okay. What was done between the time that the

1 VOCs were initially discovered in April or May of 2012 and when
2 the second round of VOCs were discovered after
3 October 22, 2012, to determine whether or not it was lab error
4 that caused the problem?

01:25PM 5 A That was nine years ago. I -- I don't remember.
6 But I -- I do believe that there were normal results following
7 that.

8 Q So -- well, how do you explain, then, that first
9 there were -- now, the results that you initially found were
01:25PM 10 really, really high. They were above the MCL; is that correct?

11 A Yes.

12 Q And several months later after non-detects,
13 again, there were results that were above the MCLs; correct?

14 A Yes.

01:26PM 15 Q Um, before the second results, had you concluded
16 that the first time you found these results above the MCL was
17 just an error, that they really weren't there?

18 A I don't remember.

19 Q Well, you knew that it wasn't -- you already
01:26PM 20 concluded that it wasn't Whittaker and the Saugus wells that
21 are causing it; correct? That you knew.

22 A Of course.

23 Q And there was no -- was there any evidence that
24 the lab just messed up and really -- and there was really
01:26PM 25 nothing there but they found the PCE anyway?

1 A Not that I can recall.

2 Q Okay. So you basically -- after you got the --
3 after you got the non-detect for several months decided, it's
4 not something we've got to worry about.

01:27PM 5 A Again, I don't remember what we were thinking at
6 the time.

7 Q Okay. All right. Let's go back to the very
8 beginning.

9 Now, as senior engineer, you were involved in all
01:27PM 10 aspects of the remediation and treatment system for Saugus 1
11 and Saugus 2; correct?

12 A I came on as the design was being completed. I
13 started my job. So I was involved in finishing that up,
14 overseeing the bidding of the construction jobs and the
01:27PM 15 construction of the facilities and then the startup --

16 Q Okay.

17 A -- testing.

18 Q And you were also -- part of your job, wasn't it,
19 was to advise the water agency on the type of remediation
01:27PM 20 needed at the site; correct? The Bermite site.

21 MR. GEE: Objection. Lacks foundation.

22 THE COURT: I think the question is were you?
23 Was that part of your job? You can answer that question.

24 THE WITNESS: The design and the remedy was
01:28PM 25 already in place before I started work with the agency.

1 Q BY MR. BLUM: Again, when was that?

2 A In 2006.

3 Q So by 2006 the remedy for the site was in place
4 and was already being performed?

01:28PM 5 A No. It was being designed.

6 Q Designed. Okay. When you say it was being
7 designed, it was being designed by Whittaker and its
8 consultants; correct?

9 A No. That was by the agency's consultants.

01:28PM 10 Q Okay. You also, as part of your job, deal with
11 determining the sources of contamination that might be
12 impacting the different water wells that are owned by the --
13 let me rephrase it.

14 Part of your job is determining the source of
01:28PM 15 contamination at the wells that are at issue in this case which
16 is S-1 and S-2 and V-201 and V-205.

17 A It became part of the job. It wasn't initially.

18 Q Okay. Now, when did it become part of the job?

19 A I suppose it was when we were looking to find the
01:29PM 20 source of the VOCs.

21 Q And when did that start?

22 A Sometime after I -- a few years after I started.
23 So let's say in the 2010 to 2015 range.

24 Q Wasn't that because the Department of Public
01:29PM 25 Health, which is now DTSC, had requested that the water agency

1 make a determination as to what the source of the VOCs was?

2 A The Division of Drinking Water who regulates our
3 system and issues our permits was concerned about the detection
4 of VOCs at our turnouts.

01:30PM 5 Q Okay. Then the DDW also wanted to know what the
6 source was; correct?

7 A I don't recall that.

8 Q Do you recall having a conversation in about
9 2013 -- let me back up.

01:30PM 10 Do you know an individual named BJ Lechler?

11 A Yes.

12 Q Who is Mr. Lechler?

13 A He is a hydrogeologist who has worked for
14 CH2M Hill, West Yost, and now with Jacobs Engineers.

01:31PM 15 Q What relationship, if any, does he have to the
16 VOCs at issue in this case?

17 A Well, he has worked on the issues for many years,
18 first as a consultant to the Army Corps of Engineers and more
19 recently to the agency.

01:31PM 20 Q Do you recall a conversation with Mr. Lechler in
21 or about 2013 where you told Mr. Lechler something to the
22 effect that you were going to start an investigation into the
23 sources of the VOCs even though you knew that Whittaker may not
24 be the source?

01:31PM 25 A I don't recall specifically the conversation, but

1 it's something I may have undertaken.

2 Q Do you recall -- let me make sure I have this.

3 Do you recall that in 2010 -- did you believe at
4 that point it had been shown that Whittaker was the source of
01:32PM 5 the VOCs?

6 A I don't recall.

7 Q All righty. Now, in terms of the water quality,
8 isn't it your understanding of the policy of the agency that,
9 if the contaminants like VOCs are below the MCL, that the
01:32PM 10 agency is going to serve that water to its customers?

11 A We adhere to the requirements of our permits
12 which require compliance with the MCL, under the MCL. But also
13 to other permit conditions such as complying with the
14 conditions of 97-005 for sources or extremely impaired sources
01:32PM 15 which in our case requires that the VOCs be non-detect at the
16 connections. And in order to remedy that, there has to be
17 treatment.

18 MR. BLUM: Referring to Mr. Leserman's deposition
19 on December 4th, 2019, page 103, lines 2 through 9.

01:33PM 20 THE COURT: Is this on December 12th or
21 December 4th?

22 MR. BLUM: The 4th, Your Honor. There's two of
23 them on that date, I believe.

24 THE COURT: I have two volumes. Both suggest
01:33PM 25 they're on the 12th.

1 MR. BLUM: It's the one that's not as a 30(b)(6),
2 Your Honor.

3 THE COURT: Still, they both say the 12th. In
4 any event, I don't know that this needs to detain us. Tell me
01:33PM 5 what the page and line number is again.

6 MR. BLUM: 103, lines 2 through 9.

7 THE COURT: I'm sorry. You're going to have to
8 continue. I was given two volumes. So unless I'm missing one,
9 I have two volumes. I don't have the one that you're referring
01:34PM 10 to.

11 MR. BLUM: Can I see if there's an objection from
12 counsel?

13 THE COURT: Yes. Let's see if there is an
14 objection.

01:34PM 15 MR. GEE: No objections.

16 THE COURT: Then you may proceed, Mr. Blum.

17 MR. BLUM: Your Honor, I will just read it. How
18 is that?

19 THE COURT: That's fine.

01:34PM 20 MR. BLUM: "Question: What is the
21 policy of the current water agency as to
22 that?

23 "Answer: To serve water that meets
24 drinking water standards.

01:35PM 25 "Question: So the current policy

1 of your employer is that, if the
2 concentrations of the VOCs are below
3 MCL, it can be delivered to customers;
4 correct?

01:35PM

5 "Answer: I believe so."

6 Q Do you recall your deposition in December of
7 2019?

8 A Yes.

01:35PM

9 Q When you made the statement that the policy was
10 to deliver water to customers below the MCLs, was that a
11 correct statement?

12 A At the time it was my first time testifying, and
13 sometimes I tend to get flustered. I was asked a question
14 about the agency policy. Didn't really have time -- much time
15 to reflect upon that. There are agency policies, for example,
16 we have a personnel policy where we get ten days' vacation a
17 year. There's a purchasing policy where we get --

01:35PM

18 MR. BLUM: Your Honor, beyond the scope of the
19 question.

01:36PM

20 THE COURT: Ask your next question, please.

21 Q BY MR. BLUM: Mr. Leserman, did somebody tell you
22 that, when you answer those questions and you want to change
23 your answer, you should say, it was my first deposition and I
24 was flustered?

01:36PM

25 THE COURT: That is argumentative. Ask another

1 question, please.

2 MR. BLUM: All right.

3 Q Now, would you agree with me, Mr. Leserman, that
4 there is no risk of the agency providing water in the future
01:36PM 5 that did not meet all applicable standards?

6 A I'm not a toxicologist. I don't perform risk
7 analysis, and it's beyond my purview. I can't tell you.

8 Q All right. Let's go back to your deposition,
9 sir.

01:36PM 10 Same deposition, page 72, lines 6 through 13.

11 THE COURT: Any objection?

12 MR. GEE: No objections.

13 THE COURT: You may proceed.

14 (The video commenced playing before the jury.)

01:37PM 15 Q BY MR. BLUM: Were you telling the truth then?

16 A That was my understanding at the time.

17 Q All right. Now, what's a sentinel well?

18 A It's a monitoring well that is upgradient of a
19 water production well.

01:38PM 20 Q And what's the purpose of a sentinel well?

21 A To provide water quality samples that can give
22 warning or notice if there is a threat to the drinking water
23 wells, either new contaminants or increased concentration of
24 known contaminants.

01:38PM 25 Q Isn't it correct that you're not aware of

1 anything or any information derived from those wells that would
2 lead you to believe that VOCs in Saugus 1 or 2 will ever exceed
3 the MCLs?

4 MR. GEE: Objection. Calls for speculation.

01:38PM 5 THE COURT: Sustained.

6 Q BY MR. BLUM: As the senior -- as a senior
7 engineer who has been tasked to advise the agency as to the
8 contamination at the site and its results, did you ever form
9 the opinion that there was no information based on the sentinel
10 wells that VOCs in S-1 or S-2 will ever exceed the MCLs?

01:39PM

11 A I haven't looked at the water quality data
12 recently, but as I recall, the water quality results have by
13 and large been fairly uniform, fairly constant. But again, I
14 haven't looked at it recently, and I wouldn't want to make any
15 conclusions.

01:39PM

16 Q We will go to your deposition, same one on
17 page 77, lines 17 through 23.

18 MR. GEE: No objections.

19 THE COURT: You may proceed.

01:40PM 20 (The video commenced playing before the jury.)

21 Q BY MR. BLUM: Sir, if we can take a look at
22 Exhibit 1343 which I believe has been stipulated to. If we can
23 go to I think it's the last page, page 4.

24 (Marked for identification and received

01:41PM 25 into evidence Exhibit No. 1343.)

1 Q BY MR. BLUM: Is that your signature?

2 A Yes, sir.

3 Q Do you recall this letter?

4 A No.

01:41PM

5 MR. BLUM: Can you go to the first page then,
6 please?

7 Q Who was the letter written to?

8 A Shu-Fang Orr.

9 Q Who is she?

01:41PM

10 A I believe her position is district engineer with
11 what is now the Division of Drinking Water.

12 Q Is it your policy, when writing to the DDW, to be
13 truthful and honest?

14 A Yes.

01:41PM

15 Q Again, can we go back to -- I'm sorry. Before we
16 do that, the date is December 21, 2016; right?

17 A Yes.

18 MR. BLUM: Can we go to the last page, please.
19 Can you blow up the part where it says "Conclusions"?

01:42PM

20 Q Can you read the conclusion to the jury, please?

21 A Certainly. "Although some of these wells have
22 detectible concentrations of constituents of concern, no
23 discernible trends can be observed at this time that would
24 suggest a water quality change or any new imminent threat to
01:42PM 25 Saugus 1 and 2 wells."

1 Q Was that a correct statement at the time?

2 A Yes.

3 Q And is it true that, since the time of this
4 letter to today, the VOCs in Saugus 1 and Saugus 2 haven't
01:42PM 5 increased, have they?

6 A Not to my knowledge.

7 Q So you would still agree there is no imminent
8 threat to Saugus 1 or Saugus 2?

9 A I believe you used the term "risk," and I was
01:42PM 10 looking at it as a risk to health which I couldn't really
11 render an opinion on. But a threat to the wells, as I
12 previously just testified, we have seen fairly consistent
13 results which is similar to the conclusions in this letter.

14 Q Would you then conclude that there is no imminent
01:43PM 15 threat to the wells, to Saugus 1 and Saugus 2 from VOCs?

16 A Based on the current information.

17 Q You answer it with a "yes."

18 A Well, I would qualify it, though, because there
19 could be a new slug of contamination that might come. So based
01:43PM 20 on the current trends, I would say there is no new threat.

21 Q New threat. And there was no threat in 2016;
22 correct?

23 A There was no new imminent threat; correct.

24 Q Does that mean that as of today there is no
01:43PM 25 imminent threat as to S-1 and S-2?

1 A Based on the current monitoring trend.

2 Q Okay. All righty. Sir, let's move on to another
3 subject.

4 Do you remember a time when the water agency was
01:44PM 5 attempting to obtain grants in order to install treatment
6 systems for some of the wells at issue here?

7 A Yes.

8 Q All right. And it was grants from the State;
9 correct?

01:44PM 10 A Yes.

11 Q All right. And do you recall that the grants
12 were denied? That's a correct statement, isn't it?

13 A I recall that we were disqualified after
14 submitting a pre-application for one of the grants.

01:44PM 15 Q The reason you were disqualified was that a
16 condition of the grant was that there actually be an order in
17 place requiring the treatment.

18 A I don't recall that.

19 Q Do you recall asking the State -- asking the DDW
01:45PM 20 if they could order -- issue an order to remediate the site --

21 MR. GEE: Objection. 403 objection.

22 THE COURT: Overruled.

23 You can answer.

24 Q BY MR. BLUM: Do you recall asking the DDW if
01:45PM 25 they could order treatment of the site -- I'm sorry --

1 treatment at the wells for VOCs so that you could get a grant?

2 A I recall the communication. I think it was by
3 e-mail. We were frustrated by the fact that we had what I
4 called a de facto MCL. And I'm referring to the operational
01:46PM 5 goal of non-detect. We were looking to the DDW staff to assist
6 us in passing on their requirement -- their operational goal to
7 emphasize the importance of that to the -- the portion of their
8 agency that issues the grants.

9 Q Isn't it correct that the DDW refused to state
01:46PM 10 that you were required to treat the VOCs?

11 A I don't recall. I don't know that they
12 responded. To use the word "refuse" is something that I can't
13 concur with.

14 Q Would you agree that they did not acquiesce, they
01:47PM 15 did not give in to your request, that they informed the part of
16 the State that was going to issue the grant that you were being
17 required to treat for VOCs?

18 A To my knowledge, they didn't follow up.

19 Q All right. Now, isn't that correct, sir, that
01:47PM 20 for Saugus 1 and Saugus 2, the permit doesn't require that VOCs
21 be non-detect?

22 A The permit has a condition setting an operational
23 goal for non-detect.

24 Q Is that a requirement or a goal?

01:47PM 25 A It's a condition of the permit. One of the many

1 conditions.

2 Q Again, your deposition page 199, lines 6 through
3 16.

4 MR. GEE: No objections.

01:48PM 5 THE COURT: Proceed, please.

6 (The video commenced playing before the jury.)

7 Q BY MR. BLUM: Is that the truth?

8 A I said that. That's the truth.

9 Q All righty. Now, what the -- what is required,
01:49PM 10 though, is, if the VOCs are detected at the turnouts, that you
11 have to report that to the DDW; correct?

12 A I believe so. That sounds correct.

13 Q But there's -- but you don't report that same
14 information regularly to the customers, do you?

01:49PM 15 A I don't handle that part of the agency.

16 Q Okay. All right. Now, Mr. Leserman, what's a
17 theoretical blend calculation?

18 A I haven't dealt with that in many, many years, so
19 I don't recall.

01:50PM 20 MR. BLUM: If you can put up 1341, please. I'm
21 sorry. That's not it. I have it wrong.

22 Your Honor, may I just check the number?

23 THE COURT: Yes.

24 Q BY MR. BLUM: The document Exhibit 1372, what is
01:51PM 25 it?

1 A The Saugus perchlorate treatment facility
2 distribution system monitoring.

3 Q Do you see a signature on the bottom?

4 A Yes.

01:51PM 5 Q Is that yours?

6 A It is.

7 Q All right. Can you tell me what the document is?

8 A Okay. No. 1 is that theoretical blend
9 calculation taken monthly.

01:51PM 10 Q Okay. And what is the theoretical blend?
11 Blending of what?

12 A As I recall, that would be the -- it reminds me
13 it is the blend that would be or the ratio of blend water from
14 the -- our surface water plants or imported water treatment
01:52PM 15 plants with the well water.

16 Q And is it correct, Mr. Leserman, that what you
17 did was you looked at things like chloride or sulfate since
18 they were both in the water from the State Water Project as
19 well as the plant and you looked at those ratios in the turnout
01:52PM 20 to determine what was the percentage of water from the two
21 sources?

22 A I don't believe that's the case on this
23 particular exhibit.

24 Q Okay. Do you know, is that -- but regardless of
01:52PM 25 this exhibit, is that generally how it was done?

1 A At some point I believe after April or midyear
2 2013 there was a calculation related to that that was inserted,
3 yes.

01:53PM

4 Q And that calculation, was it tested to see if it
5 was actually accurate?

6 A I wasn't handling it, so I can't tell you.

7 Q All right. So if you go to the top, the document
8 is dated September 2011; correct?

9 A Yes.

01:53PM

10 Q And you look at the signature is April 2013;
11 correct?

12 A Yes.

13 Q Why did it take you two years to sign the
14 document?

01:53PM

15 A I don't remember.

16 Q Okay. Was it your regular practice to wait two
17 years to sign these?

18 A No.

19 Q What was your regular practice?

01:53PM

20 A To do what -- if I recall, the 25th of the month
21 following the analyses.

22 Q And where did you get the information to put into
23 the document?

24 A These were monitoring results.

01:54PM

25 Q And were the -- these were monitoring results

1 prepared by the laboratory that was operated by the water
2 agency; correct?

3 A I believe so. We have a laboratory, and there is
4 a good chance they performed these analyses.

01:54PM 5 Q Do you know who Jeff Koelewyn is?

6 A Yes.

7 Q Who is he?

8 A He's our laboratory supervisor.

9 Q Now, when you get lab results from Mr. Koelewyn,
01:54PM 10 do you assume they are accurate?

11 A Assume they are accurate? The lab is
12 performed -- run in accordance with all of the standards set by
13 the state for environmental laboratories. So yes, I would have
14 confidence in them.

01:55PM 15 Q Don't those standards require that, if the
16 reading is inaccurate, that the lab identify it as such?

17 A I don't know.

18 Q Well, in any of the readings that you've got and
19 you've put into these theoretical blend calculations, were you
01:55PM 20 ever told by anybody at the lab they're not reliable results?

21 A No. I can't remember any.

22 MR. BLUM: If we can go to 1372, please.

23 Q All right. Now, the date of this is what?
24 September of -- I'm sorry. No. We need 1372. It's the next
01:55PM 25 one. You're right. Sorry. Let's go to a different exhibit.

1 How long have you been filling out these
2 theoretical blend calculations?

3 A How long have I?

4 Q Yes.

01:56PM 5 A I haven't been doing it for years.

6 Q When was the last time you did it?

7 A I don't remember. Certainly I did it in -- for
8 results that came out in 2011.

9 Q Okay. Sir, I think there's a notebook in front
01:57PM 10 of you that has Exhibit 1383. Tell me when you have it.

11 A I have 1382 and then 1432.

12 MR. BLUM: Your Honor, may we approach with the
13 exhibit?

14 THE COURT: Yes.

01:58PM 15 Q BY MR. BLUM: Mr. Leserman, do you recall an
16 e-mail exchange in February of 2014 with Mr. Koelewyn about
17 some sampling results that he reviewed from the Saugus
18 perchlorate treatment facility and the turnouts?

19 A I do not recall the e-mail.

01:58PM 20 Q All right. Do you have any doubt that the
21 e-mail -- that the e-mail was sent to you?

22 A No.

23 Q Do you see your response on February 10, 2014?

24 A I do.

01:58PM 25 Q Do you have any reason to believe that this

1 e-mail is not the one that you sent in reply?

2 A I have no reason not to.

3 MR. BLUM: Okay. Your Honor, I would move the
4 e-mail into evidence.

01:58PM

5 THE COURT: It will be received.

6 (Marked for identification and received

7 into evidence Exhibit No. 1383.)

8 MR. BLUM: All right. If we can blow up the
9 bottom portion.

01:59PM

10 Q All right. Mr. Koelewyn sent you an e-mail in
11 February of 2014, and -- where he talked about some VOC results
12 from the SPTF and the turnouts; correct?

13 A Correct.

14 Q And he found that the TCE levels at the turnout
15 were three times what was predicted by the blending studies
16 that you created; correct?

01:59PM

17 THE COURT: Could you just rephrase that? You
18 said the blending studies that he created?

19 Q BY MR. BLUM: That you prepared.

01:59PM

20 A Well, I didn't prepare that blending study. I
21 believe it was Jeff who did it at that point.

22 Q All right. But he told you that the results were
23 three times what was expected from the blending study; correct?

24 A Let me see here.

02:00PM

25 (Witness reviewing document.)

1 Q Do you see --

2 A He said it was measured at 1.2, and the
3 calculated version would be .44.

4 Q Which is about three times higher.

02:00PM 5 A Okay.

6 Q Right?

7 A Yes.

8 Q What he wanted to know was what does he tell
9 Dmitriy about this; correct?

02:00PM 10 A Yes.

11 Q And Dmitriy works or worked at the time for the
12 Department of Drinking Water; correct?

13 A Yes.

14 Q And he was the person who you were supposed to
02:01PM 15 report the results to; correct?

16 A Yes.

17 Q And what did you tell him?

18 A Well, I made, I suppose, what was a flippant
19 remark that we could blame it on the lab. What I meant was --

02:01PM 20 Q That doesn't answer the question. What did you
21 tell him?

22 A What did I tell Jeff?

23 Q Yes.

24 A Okay.

02:01PM 25 Q Let me help you. Didn't you say, "I will blame

1 it on," quote, "'laboratory or sampling artifacts,'" end quote,
2 "and hope that it is lowered by the next reading."

3 Isn't that what you told him?

02:01PM 4 A That's what it says there. Like I say, it was an
5 unfortunate choice of words, but it refers to the fact that
6 there can be errors even in the best of labs. There can be
7 contamination. There can be errors in sampling. Sampling --
8 because it can be done wrong. There can be switching of
9 samples inadvertently. So that's what I referred to. If the
02:02PM 10 next results came back normal, then we can look at it as some
11 anomaly. Like I say, it happens to the best and most reputable
12 of the labs.

13 And furthermore, Dmitriy at DDW was aware of the
14 results. It wasn't as if we were hiding anything from him.

02:02PM 15 Q When you told Mr. Koelewyn, "I will blame it on
16 laboratory or sampling artifacts," in fact, you had no basis
17 for concluding that was the reason the numbers were so high,
18 didn't you?

19 A I said it was an unfortunate choice of words.

02:03PM 20 Q That wasn't my question, Mr. Leserman.

21 When you said it, you had no reason to believe it
22 was true; is that correct?

23 A It could have been anything that caused that --
24 that -- that increase in the concentration, and certainly it
02:03PM 25 was our hope that it would come back down to normal like we had

1 been expecting with the next results. In fact, it did.

2 Q Isn't that -- in 2012 isn't that exactly what
3 happened also? You had high readings. You said, let's blame
4 it on lab results. And you hoped it would come down to zero,
02:03PM 5 and it did for a while until it didn't. Isn't that basically
6 what the go-to position is of the water agency, blame it on lab
7 error and hope for the best?

8 A Absolutely not. If there is an anomalous result,
9 we will wait for a confirmation sample which is, as far as I
02:04PM 10 know, my understanding is standard in the industry. And if
11 it's repeated, then it's investigated. And that's what
12 happened in 2012.

13 Q Now --

14 A It was repeated, and we investigated the problem,
02:04PM 15 found out that there was a -- a different source, and we cut
16 off and flanged off the pipeline that caused that problem in
17 2012.

18 Q This isn't the only time that Mr. Koelewyn has
19 sent you an e-mail where he said, hey, we got readings here
02:04PM 20 that are a problem or words to that effect, is it?

21 A I don't know.

22 Q Can you take a look at Exhibit 1384?

23 THE COURT: Please do not publish this unless
24 it's been agreed to.

02:05PM 25 MR. BLUM: We're not going to, Your Honor.

1 THE COURT: All right.

2 Q BY MR. BLUM: Do you recall getting an e-mail
3 from Mr. Koelewyn in October of 2015?

4 A No.

02:05PM 5 Q Do you recall -- do you have any reason to doubt
6 you didn't get it?

7 A I don't see any e-mail on the screen here.

8 Q It should be in one of the books. I'm sorry,
9 sir. It's 1384.

02:05PM 10 A I have it.

11 Q Do you recall getting this e-mail from
12 Mr. Koelewyn in October of 2015?

13 A No.

14 Q Do you have any reason to believe you did not
02:06PM 15 receive it?

16 A No.

17 MR. BLUM: Your Honor, I'd like to admit it into
18 evidence.

19 THE COURT: It will be received.

02:06PM 20 (Marked for identification and received
21 into evidence Exhibit No. 1384.)

22 MR. BLUM: If you can blow up the first paragraph
23 where it says, "Beginning."

24 Q All right. Sir, in October of 2015, Mr. Koelewyn
02:06PM 25 wrote you and Brian Folsom and Gary Haggin; correct?

1 A Yes.

2 Q Who is Brian Folsom?

3 A He was the manager of engineering and operations
4 at the time.

02:07PM 5 Q Was he your boss?

6 A Yes.

7 Q All right. And who is Gary Haggin, H-a-g-g-i-n?

8 A He was the operations superintendent.

9 Q Okay. And in the first paragraph Mr. Koelewyn
02:07PM 10 says, "Beginning about April of this year, there had been
11 random detections of PCE at SC-1, see below. The effluent from
12 the Saugus plant was about .6 to .8 PPB of PCE. And after
13 blending, the source of the PCE would not be the Saugus plant."
14 Do you see that?

02:07PM 15 A Yes.

16 Q Was Mr. Koelewyn right?

17 A I would agree.

18 Q Sorry? I apologize. I didn't hear you.

19 A I would agree.

02:07PM 20 Q So you knew that in October of 2015 there were
21 hits of PCE at the turnouts that could not have been from the
22 Saugus plant; correct?

23 A Yes.

24 Q And it's correct, sir, that no investigation was
02:08PM 25 done to follow up on this e-mail and to find what the source

1 was of those PCEs.

2 A I don't recall.

3 Q You know of no investigation; correct?

4 A I know of none.

02:08PM

5 Q All right. Now, Mr. Koelewyn then went on to
6 say, "Since the September 26 had a level of 3.6 PPB, I thought
7 we should take some action before we have an MCL exceedance."
8 In parentheses, "MCL for PCE equals 5 PPB."

02:09PM

9 Mr. Koelewyn was concerned that these numbers
10 were going to rise and eventually exceed the MCLs; correct?

11 A That's what it says.

12 Q So what did you do when he sent this e-mail to
13 you?

14 A I don't remember.

02:09PM

15 Q All right. Now, I want to move on to
16 Mr. Lechler and the investigation.

17 You were in charge of investigating what the
18 sources were of VOCs at the wells; correct?

19 A I oversaw the work of the consultant.

02:09PM

20 Q All right. And do you recall that in 2013 the
21 water agency asked for bids from different consultants to
22 investigate the source?

23 A I do.

02:09PM

24 MR. BLUM: All right. If we could see
25 Exhibit 1353.

1 THE COURT: Is this a stipulated exhibit?

2 MR. BLUM: Yes, sir. I'm sorry. Yes,
3 Your Honor. It's stipulated.

4 (Marked for identification and received
02:10PM 5 into evidence Exhibit No. 1353.)

6 Q BY MR. BLUM: Do you recall this letter to you
7 from Todd Engineers?

8 A I don't recall it.

9 Q Do you recall that you received proposals for an
02:10PM 10 investigation?

11 A Yes.

12 Q Do you recall one of them was from
13 Todd Engineers?

14 A Yes.

02:10PM 15 Q Todd Engineers had been working for the water
16 agency a long time previous to 2013; correct?

17 A For a few years.

18 Q Well, wasn't Todd, the guy whose name is up
19 there, wasn't he an expert in another lawsuit for the water
02:10PM 20 agency?

21 MR. GEE: Objection. Lacks foundation.

22 Q BY MR. BLUM: Or would you know?

23 THE COURT: Sustained. Another question, please.

24 MR. BLUM: All right.

02:10PM 25 Q Sir, if we can go to -- excuse me, Your Honor.

1 All right. Now, if we can go to the second
2 paragraph that begins "Groundwater pumped from CLWA," all
3 right. And do you see where it says, "The potential sources of
4 VOCs in the Saugus wells have not been conclusively
5 identified"?

02:11PM

6 A Yes.

7 Q Would you agree that, as of October 14, 2013,
8 they had not been?

9 A Yes.

02:11PM

10 Q Okay. If we go to page -- if we go to page 3,
11 the first paragraph, do you see where it says, "However, there
12 is evidence of -- that VOCs have been transported in
13 groundwater from upgradient sources to downgradient areas
14 including the Saugus wells. Several upgradient VOC sources
15 have been identified including the Whittaker Bermite, Whittaker
16 site and the Saugus Industrial Center, SIC site. Other sources
17 of TCE may also exist near the production wells probably
18 contributing to VOCs in the wells."

02:12PM

19 THE COURT: Potentially.

02:12PM

20 MR. BLUM: I'm sorry.

21 Q "Potentially contributing to VOCs in the wells"
22 as of 2013. Would you agree with that?

23 A That's what it says there.

24 Q Do you agree it's a correct statement?

02:12PM

25 THE COURT: The Court is going to sustain its on

1 objection as lack of foundation.

2 MR. BLUM: All right.

3 Q And what you were trying -- is it correct that
4 the purpose that you were asking for the proposal was to
02:12PM 5 evaluate existing geologic groundwater flow and groundwater
6 quality information and, if possible, identify the sources of
7 VOCs detected in the Saugus wells? Is that the purpose that
8 you were seeking information?

9 A We were trying to find out what the sources of
02:13PM 10 the contamination were, and those characteristics you described
11 certainly are consistent with that.

12 Q Now, this letter was dated October 2013. When
13 did that investigation begin?

14 A I don't recall. Sometime after that.

02:13PM 15 Q Well, wasn't -- Todd was never hired to do
16 anything that they -- the proposal -- within the proposal;
17 correct?

18 A It went to CH2M Hill who had been performing work
19 on the site for -- and in the valley for years.

02:14PM 20 Q Okay. But they weren't hiring until 2015;
21 correct?

22 THE COURT: Who is the "they"?

23 Q BY MR. BLUM: CH2M Hill.

24 A I don't know for sure, but I have no reason to
02:14PM 25 doubt that.

1 Q All right. Weren't you -- didn't you have a role
2 in 2015 relating to CH2M Hill's report -- never mind. Let me
3 rephrase it.

02:14PM 4 In 2015, was -- did CH2M Hill, were they retained
5 to identify what was going to be needed in order to evaluate
6 what the sources of the VOCs were?

7 A I'd have to take a look at the documents to
8 confirm or deny that.

9 Q All right. Just a second.

02:15PM 10 All right. Your deposition 12/4 at page 112,
11 lines 1 through 11.

12 THE COURT: Are you just looking to confirm what
13 the date was?

14 MR. BLUM: No. And that that was the purpose for
02:15PM 15 the retention.

16 MR. GEE: No objection.

17 THE COURT: Proceed, please.

18 MR. BLUM: All right.

19 "Question: Did you play any role
02:15PM 20 in the creation of the 2015 report?

21 "Answer: Yes.

22 "Question: What was your role?

23 "Answer: My role was to identify
24 what should be done to prepare
02:16PM 25 requests for proposals to circulate

1 it and then I'd manage the effort
2 to evaluate the proposals.

3 "Uh-huh.

4 "Answer: And then we selected

02:16PM

5 CH2M Hill, and I was the project manager
6 or the liaison with CH2M Hill when the report
7 was performed."

8 Q Does that refresh your recollection?

9 THE COURT: About what?

02:16PM

10 Q BY MR. BLUM: About what your role was in
11 relation to the CH2M Hill report?

12 A Yes.

13 Q All right. Is that statement correct?

14 A Yes.

02:16PM

15 Q All right. And then it goes on.

16 "Question: And the purpose of the
17 report was a source identification study.

18 "Answer: Correct.

19 "Question: Any other purposes for
20 the report?

02:16PM

21 "Answer: No.

22 "Question: And now the next sentence
23 says --

24 "Answer: Or I should say, in

02:16PM

25 addition to that, to perhaps identify

1 any other work that would need to be
2 performed in order to determine perhaps
3 the extent of the contamination or what
4 would need to be done in order to more
02:17PM 5 readily identify who the source might be."

6 Is that a correct statement?

7 A Yes.

8 Q Now, am I right that the purpose of a 2015 report
9 by CH2M Hill was to identify potential sources in which a
02:17PM 10 follow-up report would then specify as to what the real sources
11 were?

12 A That's what I said during the deposition. But
13 really, I would want to see the report again to see what the
14 goals and objectives were.

02:17PM 15 Q Mr. Leserman, wasn't the budget for the 2015
16 report limited to only existing data and material available on
17 a computer since there was supposed to be a follow-up report?

18 A There was the possibility of a follow-up report
19 depending upon what was -- what the findings were on this
02:18PM 20 initial report.

21 Q All right. So it's your testimony that, whether
22 or not there was going to be a follow-up report, an additional
23 report hadn't been determined yet?

24 THE COURT: At what point?

02:18PM 25 Q BY MR. BLUM: At the point -- at the time you

1 hired CH2M Hill, was it the intent they do two reports, a
2 preliminary one and a follow-up one?

3 A The report was to do -- the purpose was to do one
4 report and see what follows.

02:18PM

5 Q Okay. And didn't Mr. Lechler, who was the
6 project manager and actually wrote the report, conclude in the
7 report that he did, that potentially SIC or Whittaker could be
8 the sources of the VOCs?

02:19PM

9 A The findings and reports said that Whittaker was
10 the likely source. SIC was a possible one but less likely.

11 Q Didn't Mr. Lechler say, in order to make a
12 determination that either were the source, more information and
13 more investigation needed to be done?

02:19PM

14 A More information may have provided additional
15 insight. It seems that every technical memo always has a
16 recommendation that more work could be done to increase
17 certainty.

02:20PM

18 Q All right. Now, you participated in discussion
19 with your superiors as to whether or not an additional report
20 should be done; correct?

21 A I don't remember.

02:20PM

22 Q Do you remember that the reason -- that one of
23 the reasons an additional report wasn't done is because, after
24 talking to your lawyers, the conclusion was reached that it was
25 best to just proceed with litigation?

1 MR. GEE: Objection. Calls for speculation.

2 THE COURT: Overruled on that ground.

3 THE WITNESS: We discussed this internally with
4 my superiors and our technical consultants, and we looked at
02:20PM 5 the history we had with Whittaker and their cooperation in
6 undertaking further studies and paying for further studies.
7 That very often was an exercise in futility.

8 An example was a containment evaluation we wanted
9 to have done for years. There was reluctance, if not refusal,
02:21PM 10 to approve it and to pay for it. So we internally thought that
11 litigation was a possibility that perhaps should be pursued.

12 Q BY MR. BLUM: And that's what counsel
13 recommended; correct?

14 MR. GEE: Objection. Calls for attorney/client
02:21PM 15 privilege.

16 THE COURT: Sustained.

17 MR. BLUM: We can go to the deposition on 12/4,
18 page 116, lines 5 through 14.

19 MR. GEE: I'm sorry, counsel. What page?

02:22PM 20 MR. BLUM: 116, lines 5 through 14.

21 MR. GEE: No objection.

22 THE COURT: You may proceed.

23 (The video commenced playing before the jury.)

24 Q BY MR. BLUM: Is that the truth?

02:23PM 25 A As I just testified, discussions took place

1 internally with the consultants, with my superiors. I suppose
2 at that point we thought that litigation was a possibility that
3 should be considered. At that point obviously we're going to
4 consult with attorneys before we make that decision, the real
02:23PM 5 need for it and the pros and cons where they were all discussed
6 internally.

7 Q But the rationale as to why the decision was
8 made, the deposition portion we read, is that accurate?

9 A We made the decision based on our experience and
02:24PM 10 the technical issues, and what I said in the deposition
11 certainly was true, but the lawyers did not make the decision.

12 Q Okay. Sir, what's -- do you know what
13 fingerprinted is when it relates to VOCs?

14 A I'm familiar with the concept.

02:24PM 15 Q What's the concept?

16 A The concept is that certain isotopes might be
17 unique to one sample of chemicals as compared to others.

18 Q Okay. And at one point in time is it true that
19 the water agency considered doing fingerprinting to determine
02:25PM 20 whether or not the VOCs were from the Whittaker site versus
21 another site? Correct?

22 A The idea was brought to our attention. We
23 considered it. We mentioned it to our consultants who are
24 experts in it. They determined that it would be likely
02:25PM 25 inconclusive and it would be a dead end.

1 Q Isn't one of the other things that they told you
2 is one reason you shouldn't do it is because it could exonerate
3 Whittaker?

4 A There was one consultant who mentioned that.

02:25PM 5 Q It was Lynn Takaichi; correct?

6 A It was.

7 Q Mr. Takaichi had been employed by the district
8 for numerous years prior to determining or prior to stating
9 that it shouldn't be done because it might exonerate Whittaker.

02:26PM 10 A He had. But he also said it would be likely
11 inconclusive, as did the other consultants, the other experts.
12 And furthermore, Whittaker had the opportunity to suggest it.
13 That never happened. And they could have implemented it. That
14 never happened, to my knowledge.

02:26PM 15 Q Was the primary reason it wasn't done was because
16 you knew the results could be to exonerate Whittaker?

17 A Absolutely not. It was because it was a
18 dead-end.

02:26PM 19 Q Didn't you also discuss this issue with your
20 counsel? Yes or no.

21 MR. GEE: Objection. Attorney/client.

22 THE COURT: I'm going to sustain the objection.
23 It's also going to be on 403 grounds.

24 MR. BLUM: All right. That's all, Your Honor.

02:26PM 25 THE COURT: All right. Mr. Gee, approximately

1 how long do you have?

2 MR. GEE: Approximately half an hour.

3 THE COURT: All right. Since it's almost 2:30,
4 we will go ahead and pick this up tomorrow then.

02:27PM 5 Ladies and gentlemen, it is now 2:30. We will
6 break as we have been doing at 2:30.

7 Please remember, don't speak to anyone about the
8 case, the people, or the subject matter involved. Continue to
9 keep an open mind. And we will see you tomorrow at 8:30.

02:27PM 10 (The following proceedings were held in
11 open court outside the presence of the jury:)

12 THE COURT: Mr. Leserman, you are ordered back
13 here tomorrow at 8:30, sir.

14 All right. We are going to take about a
02:27PM 15 13-minute break, and then we will return. I do want to start
16 addressing jury instructions and also, to the extent there are
17 other issues to discuss before tomorrow morning, I want to hear
18 about them rather than being presented with them tomorrow at
19 8:00 o'clock if at all possible to avoid. So everyone is
02:28PM 20 ordered back here at 2:40.

21 (A recess was taken at 2:28 p.m.)

22 (The following proceedings were held in
23 open court outside the presence of the jury:)

24 THE COURT: Back on the record in the trial
02:46PM 25 matter outside the presence of the jury.

1 I do want to discuss with counsel some of the
2 jury instruction issues. I don't intend to get through all of
3 the disputed jury instructions that have been presented to the
4 Court. I understand we did receive some briefing from
02:47PM 5 Whittaker with regard to the issues that were discussed last
6 week concerning some of the instructions including restoration
7 damages as well as other issues concerning negligence, per se.
8 We have not yet received anything from the plaintiff. So I
9 will give you an opportunity to file that before we take it up.

02:47PM 10 Let me start with successor liability. I did
11 hear Mr. Blum indicate that he intends largely to respond to
12 this, if I remember correctly, with the judgment for motion or
13 judgment as a matter of law. And I did receive -- I have not
14 yet reviewed -- the briefing on that.

02:48PM 15 Beyond that, let me hear whether you have
16 anything further that you wish to add, Mr. Blum.

17 MR. BLUM: Your Honor, we conclude for the
18 purposes of the JMOL it is irrelevant.

19 THE COURT: All right. But if the Court either
02:48PM 20 denies or defers ruling on your motion, then you're not
21 objecting to the Court providing the instruction?

22 MR. BLUM: We do object to the Court instructing
23 the jury that we are the successor. We believe that at a
24 minimum --

02:48PM 25 THE COURT: I'm going to need you to go to the

1 lectern, please.

2 MR. BLUM: Your Honor, we believe that at a
3 minimum it's an open question and that there's no basis for the
4 Court -- well, let me back up.

02:49PM 5 If the Court determines from a factual basis that
6 we are the successor, then I have not reviewed the instruction
7 recently, but then the Court should instruct the jury on what
8 the Court has decided.

9 THE COURT: But the issue I think for the jury on
02:49PM 10 this is whether you, in effect, or your client admitted that it
11 was the successor. And you may recall we had a discussion
12 where I told you I was not persuaded by your procedural
13 argument that simply by admitting on information and belief
14 that it wasn't an admission. And I think you either conceded
02:49PM 15 that or submitted to it. That's my interpretation.

16 MR. BLUM: We believe the issue had been argued
17 out.

18 THE COURT: Fair enough. And so without further
19 argument, the Court is not persuaded by your procedural
02:49PM 20 argument about information and belief.

21 In light of that, what is left to your argument?

22 MR. BLUM: Well, the Court -- I understand the
23 rule is, if you believe we admitted in the Answer, we are bound
24 by it. That is the rule. Then you need to instruct the jury.

02:50PM 25 The only thing I haven't done -- I would ask the

1 opportunity to -- is to take a look again at the actual
2 instruction to see if we have a problem with the exact wording.

3 THE COURT: That is fine. I will allow you to do
4 it. It essentially just states -- actually, I can probably
02:50PM 5 turn to it in just a second.

6 MR. BLUM: I'm grabbing it, Your Honor.

7 THE COURT: Yes. I have it. It simply says that
8 Whittaker Corporation is the successor in interest to the
9 Bermite Powder Company and Whittaker Bermite Corporation as
02:50PM 10 Whittaker Corp. assumed control of the Whittaker Bermite site
11 after a merger or acquisition of its predecessor companies.
12 And here's the key part. Therefore, you should consider the
13 conduct of Bermite Powder Company, Whittaker Bermite
14 Corporation, and Whittaker Corporation as if they were one and
02:51PM 15 the same company.

16 MR. BLUM: That I disagree with because that's
17 not the way it works.

18 THE COURT: All right. Why don't you tell me how
19 you'd like me to modify it.

02:51PM 20 MR. BLUM: Your Honor, first of all, the use of
21 the word predecessor in interest is not correct verbiage.

22 THE COURT: It says, "Successor in interest and
23 after a merger or acquisition of its predecessor companies."

24 MR. BLUM: I apologize. A successor in interest
02:51PM 25 only relates to the land. But that's a little technical, I

1 understand. But maybe it's one of my faux pas.

2 THE COURT: So I did give the parties an
3 opportunity -- I'm not going to hold you to it -- I gave you an
4 opportunity, if you had objected to an instruction and had a
02:51PM 5 competing one in the event that you lost, you can give it to
6 me. I don't think Whittaker did that. I'm going to give you
7 that opportunity right now if you want to tell me how I should
8 modify it to conform to your admission.

9 MR. BLUM: Your Honor, I'm just trying to find
02:52PM 10 the instruction. Page 40. Okay.

11 I think all the instruction needs to say is that
12 Whittaker is the successor to Bermite Water Corporation and is,
13 therefore, liable for any wrongs that Bermite committed. They
14 still gotta prove that Bermite did something wrong.

02:52PM 15 THE COURT: You don't mean Bermite Water. You're
16 saying Bermite Powder?

17 MR. BLUM: Yes. Yes, Your Honor.

18 THE COURT: All right. Any objection to that
19 modification?

02:53PM 20 MR. RICHARD: As I understand it -- I mean, I --
21 probably not, Your Honor. I also haven't seen the competing
22 instruction.

23 THE COURT: All right. I'm a little reluctant to
24 do this because I haven't always been successful, but I'm going
02:53PM 25 to do it and see if you will simply meet and confer and give me

1 the agreed-upon language.

2 MR. BLUM: Yes, sir.

3 THE COURT: Not competing language. But the
4 agreed-upon language that conveys what the admission was.

02:53PM 5 MR. BLUM: Your Honor, if we can't decide, we
6 will arm wrestle for it.

7 THE COURT: All right. Let's move on, please, to
8 the next disputed instruction. One moment.

9 So the next one I'm going to pass is the
02:53PM 10 negligence, per se.

11 Then there's one about the SIC and the settlement
12 deduction. Let me first start with you, Mr. Richard, on this
13 one. I'm going to treat this one -- and this one, I think, is
14 plaintiff's proposed Instruction No. 43 and defendant's
02:54PM 15 proposed Instruction No. 44. I'm going to treat this one
16 together with the apportionment of responsibility instruction
17 that is in dispute, and that is proposed Instruction No. 50.

18 So I'm going to start with you, and I'm going to
19 start with proposed Instruction No. 50 on apportionment of
02:54PM 20 responsibility. This appears to the Court to be a standard
21 CACI instruction. Even though there's a contribution bar, I'm
22 not understanding why there's an objection by the plaintiff to
23 an apportionment, putting aside the issue of apportionment for
24 some undefined category of other sources.

02:55PM 25 So, first of all, are you taking issue,

1 Mr. Richard, with an apportionment instruction, CACI 406, that
2 would at least include SIC?

02:55PM 3 MR. RICHARD: No, Your Honor. I believe our
4 concern was with the reference to non-party. I'm just trying
5 to reorient myself to what I was thinking a couple months ago.
6 It seemed overbroad as drafted.

02:56PM 7 THE COURT: All right. Because I then will turn
8 to you, Mr. Blum, because it appears to me that, without
9 dispute, there ought to be CACI 406. An instruction ought to
10 be given allowing the jury to apportion. I have certainly
11 heard about SIC as potentially responsible for the VOCs.

02:56PM 12 It seems to the Court, Mr. Blum, that you want to
13 have this undefined category of other sources. And so perhaps
14 you can explain to me what it is that you have in mind and why
15 it is that the Court lawfully can give it.

02:56PM 16 MR. BLUM: Well, Your Honor, one of the big
17 differences between apportionment under the torts that we are
18 dealing with and that under Superfund is that under Superfund
19 you have to actually have the party in the case or settled out
20 to have an apportionment under 113.

21 Under the torts in California, California law
22 doesn't require that the party be named or --

23 THE COURT: Let me just go ahead and advance this
24 a step.

02:57PM 25 MR. BLUM: Sure.

1 THE COURT: You're presenting to the Court basic
2 apportionment principles.

3 MR. BLUM: Uh-huh.

4 THE COURT: And I am familiar with basic
02:57PM 5 apportionment principles. So clearly SIC is no longer a party,
6 and they could be included. And we could have ABC company, if
7 there's evidence that ABC company is responsible, and even
8 though they're not a party, never were a party, they could be
9 subject to the apportionment principle. That much I

02:57PM 10 understand, and I don't think there is a dispute about that.

11 I think the question and the dispute is over this
12 undefined nondescript category of other sources.

13 So, first of all, tell me, are you asking for the
14 jury to apportion other sources, some nondescript category for
02:57PM 15 apportionment purposes?

16 MR. BLUM: I'm not sure I would use those exact
17 words, but yes.

18 THE COURT: All right. So tell me what the
19 authority is that you would cite to the Court and then also
02:58PM 20 what evidence is.

21 MR. BLUM: Well, Your Honor, the authority that
22 we cited is the *DaFonte* case. All we have to show is that
23 there's other tortfeasors. We don't have to name them. They
24 don't have to be part of the case.

02:58PM 25 THE COURT: Well, *DaFonte* doesn't address this

1 specific issue, does it? Again, I broke these out from the
2 basics where you're trying to educate the Court
3 appropriately -- I love to be educated -- on basic
4 apportionment principles. You have educated me. I understand
02:58PM 5 basic apportionment principles. That's what *DaFonte* addresses.
6 It doesn't address the question about having a category of
7 potential nondescribed or undescribed tortfeasors, does it?

8 MR. BLUM: *DaFonte* not directly, Your Honor, but
9 it does talk about the fact that there is a right to
02:59PM 10 apportionment for all tortfeasors, and there is no requirement
11 that they be specifically named. The best example I can give
12 the Court and the simplest one is, for instance, in asbestos
13 cases. The defendant has the ability to say unknown suppliers
14 of asbestos to this facility apportioned to them. That's
02:59PM 15 always done.

16 THE COURT: So even if -- when you say it's
17 always done, let's be more precise, Mr. -- are you an -- have
18 you tried asbestos cases where you're telling the Court that
19 you have had an issue go to the jury where you don't even
02:59PM 20 define who these other potential asbestos suppliers were, you
21 have no evidence as to who they were, but you simply give it to
22 the jury as to a -- a nondescript categorization?

23 MR. BLUM: Your Honor, I have done the jury
24 instructions. The two cases of asbestos I had I settled before
03:00PM 25 it went to the jury. But we had done the instructions.

1 This is what the difference is. You can't just
2 say where there's no evidence. If there's -- for instance, if
3 there was evidence that there was an exposure because the
4 supplier is at a facility and we don't know who the suppliers
03:00PM 5 were, that's specific enough. I think we have specific
6 evidence of different sources. And a lot of the evidence is
7 going to be laid tomorrow and the day after.

8 THE COURT: All right. So I think, first of all,
9 this is helpful because now we are on the same page. You would
03:00PM 10 agree that perhaps you don't have to know that the company's
11 name is ABC company, but you do have to specify that there was
12 a particular source and there's evidence of that particular
13 source.

14 MR. BLUM: Yes. Yes.

03:00PM 15 THE COURT: You can't just have a broad category
16 of others.

17 MR. BLUM: Right. And we're not asking the Court
18 to do that.

19 THE COURT: So tell me what are the other
03:00PM 20 specific sources? Because that's not what you provided to the
21 Court in the proposed jury instruction.

22 MR. BLUM: Well, Your Honor, part of it was
23 because we weren't 100 percent sure what the evidence was going
24 to show, and we wanted to give ourselves honestly some
03:01PM 25 flexibility how the evidence was going to go in. And we

1 weren't sure some of the evidentiary rulings you were going to
2 make based on the objections plaintiffs were raising.

3 THE COURT: So tell me who are the other sources
4 that you would like to have apportionment for.

03:01PM

5 MR. BLUM: We believe there is a known -- there
6 is a source of VOCs that we find near the mall wells and DW
7 wells and that that contamination has been drawn to V-201, and
8 we do not know who is the source.

03:01PM

9 We also believe there is a source for PCE in I
10 believe it's Saugus 1 that is unknown, but Mr. Hokkanen will
11 identify that it is not from SIC and it's not from us.

12 THE COURT: What I'm going to have you do is
13 you're going to have to provide to the Court a revised
14 instruction that specifies --

03:02PM

15 MR. BLUM: Yes, sir.

16 THE COURT: With regard to the mall wells or some
17 other source, you're going to have to provide the Court with
18 something more specific as to who the source is. Just to say
19 we don't know the source is not going to be sufficient in the
20 Court's judgment.

03:02PM

21 MR. BLUM: Well, Your Honor, for the mall walls,
22 there's testimony from Mr. Trudell we're not the source. The
23 evidence we're not that source comes from both sides.

03:02PM

24 THE COURT: Who is the source? It's your
25 affirmative defense.

1 MR. BLUM: Your Honor, we don't know because
2 as -- as we just heard today, to some extent, VOCs are
3 ubiquitous. They are used everywhere. It would be impossible
4 for us to identify the source. But we know there is a specific
03:02PM 5 disposal at a specific location. We're not saying -- we're not
6 being -- we're not saying somewhere within a 40-mile radius.
7 We're going to be able to talk about, for instance, for AL-6,
8 there is a specific spot of contamination for AL-6 that is not
9 from either us or SIC. So it's not going to be like the jury
03:03PM 10 is going to have to guess on where we are or what we are doing.
11 We will be specific.

12 THE COURT: What will be the specific evidence,
13 by way of offer of proof, as to the allocation as between or as
14 among the defendants including Whittaker in this case?

03:03PM 15 MR. BLUM: A lot will be supplied by Mr. Hokkanen
16 tomorrow.

17 THE COURT: What is the offer of proof on the
18 allocation?

19 MR. BLUM: I don't want -- Your Honor, I'm not
03:03PM 20 100 percent sure, and I do not want to make a misrepresentation
21 to the Court.

22 THE COURT: Did this -- did your expert testify
23 in deposition or expert reports as to an allocation?

24 MR. BLUM: No.

03:04PM 25 THE COURT: So how do you intend to introduce it?

1 MR. BLUM: Because he did testify these are
2 sources and they have -- and that, for instance, for the AL-6,
3 it's -- all of the PCE there in that well -- and I believe it's
4 Saugus 1 -- is from somebody else. So that's easy.

03:04PM

5 THE COURT: Well, it may be easy theoretically
6 for him to say that. But what expert report or deposition did
7 you proffer -- is it Dr. Hokkanen?

8 MR. BLUM: No. It's Mr.

03:04PM

9 THE COURT: -- Mr. Hokkanen to provide an
10 allocation?

11 MR. BLUM: Your Honor, I don't think we have
12 anybody that has a specific percentage, but I don't believe
13 that somebody has to give a percentage.

03:04PM

14 THE COURT: So when you tell the jury this is the
15 percentage that the evidence shows you can fill in, here's
16 Whittaker, here's SIC, here's the mall well contributor, here's
17 the AL-6 contributor, tell me what's the evidence that you're
18 going to present to the jury that will enable them to do that
19 other than through guesswork?

03:05PM

20 MR. BLUM: There will be evidence about different
21 concentrations. There will be evidence about whose VOCs it is,
22 when it got there, what part we contributed versus what other
23 people contributed. And from that evidence, the jury is able
24 to draw their own conclusions.

03:05PM

25 In fact, as I planned it out because, you know,

1 closing is this week, I was going to basically leave it up to
2 the jury. I was not going to give a number, partly because my
3 experts didn't, and I didn't want to run afoul of anything that
4 the Court was going to do.

03:05PM

5 But I think there's sufficient -- there's
6 sufficient evidence for the jury to. First, the jury could
7 believe that, yeah, Whittaker is a source but it's just a tiny
8 bit and the problems are from the stuff that's being drawn in
9 from the mall wells.

03:06PM

10 THE COURT: So the descriptor that you intend to
11 use will be something along the lines, as the Court just
12 articulated, the mall wells contributor?

13 MR. BLUM: It's the mall wells, actually,
14 Your Honor. M-a-l-l. Not mull.

03:06PM

15 THE COURT: M-a-l-l.

16 MR. BLUM: Yes. And the DW wells.

17 THE COURT: That's what I intended to say. I
18 don't know if you just misunderstood me or I misspoke.

19 MR. BLUM: It's been a long day, Your Honor. I'm
20 sorry.

03:06PM

21 THE COURT: In any event, it's not important.

22 But putting aside the way the Court has
23 pronounced the name, is it your intention -- I will use AL-6 --
24 to say that the -- the line item for the apportionment will be
25 the LA-6 -- AL-6 contributor?

03:06PM

1 MR. BLUM: Yes.

2 THE COURT: And do you have any contributors
3 other than the mall well and the AL-6 contributors?

4 MR. BLUM: DCE contributors to Saugus 2 and 1.

03:07PM

5 THE COURT: And you're just going to leave it up
6 to the jury to make the percentage allocations among all of the
7 potential contributors?

8 MR. BLUM: After we go over the evidence that
9 supports it, yes.

03:07PM

10 THE COURT: All right. I will hear further from
11 you, Mr. Richard.

12 MR. RICHARD: My concern, Your Honor, was that
13 the Court ruled on motions in limine some time ago including
14 opinion No. 9 from Mr. Hokkanen on this whole other sources
15 thing. So the idea that we're now going to be talking about
16 contamination of alluvium wells -- when you hear AL, we're
17 talking about shallow aquifer wells -- we're really backing
18 into all this speculation of other sources.

03:07PM

19 So I think Your Honor had suggested or admonished
20 that I raise issues. This is an issue. It sounds like
21 Mr. Hokkanen is going to go well beyond both his report and his
22 deposition as well as his opinion No. 9 which has been
23 stricken. I can represent that to the Court now. When I go
24 back and do my homework tonight, I have a fear I will be
03:08PM 25 popping up every other question that they're asking him.

1 THE COURT: Well, there has been some evidence,
2 has there not, about potential contributors that are not either
3 Whittaker or SIC with respect to these other wells, or at least
4 there will be?

03:08PM

5 MR. RICHARD: Well, those are two very different
6 things. I listened today. There's been reference to SIC, but
7 there's no connect the dots to any scientific methodology. It
8 wasn't in Mr. Hokkanen's report at the time we filed the motion
9 in limine. It can't mysteriously appear now. It wasn't there.

03:08PM

10 They're limited to that report.

11 So we have heard the words, but for all the
12 reasons it was inadmissible two months ago, it's still junk
13 science or speculation.

03:09PM

14 THE COURT: And you're referring to the Court's
15 ruling on Mr. Hokkanen's opinion No. 9 that, based on the
16 available data, other previously identified sources could be
17 contributing VOCs in the water agency's distribution system?

18 MR. RICHARD: I believe that was opinion No. 9.
19 I could be wrong. I don't have it in front of me, Your Honor.

03:09PM

20 THE COURT: Well, I'm looking at at least the
21 Court's notes on its rulings. And I believe I denied without
22 prejudice because you were challenging Mr. Hokkanen's
23 conclusions rather than his methodology.

03:09PM

24 MR. RICHARD: Might be opinion No. 8, Your Honor.
25 As I said, I don't have it in front of me. We can laugh but I

1 don't --

2 THE COURT: Whoever just laughed, if I hear
3 that -- Mr. Blum, was that you, sir?

4 MR. BLUM: It was. I apologize, Your Honor.

03:09PM 5 THE COURT: Next time it happens, expect that I
6 will sanction you on the spot.

7 And this is No. 8?

8 MR. RICHARD: Yes. If I can confer with my
9 colleague, Mr. Gee.

03:10PM 10 THE COURT: Yes.

11 MR. GEE: It was included in Motion in
12 Limine No. 1. I don't have the opinion in front of me.

13 THE COURT: All right. So it is opinion No. 8
14 that there are other potential sources that could be

03:10PM 15 contributing VOCs. And I believe that I granted that because
16 it was based largely on Mr. Shoup's report. So if that is the
17 basis, that was the Court's ruling, and Mr. Blum is going to
18 have to come up with something else.

19 So you would agree, though, that, if he is able
03:10PM 20 to establish that there is some other source that was not SIC
21 or Whittaker, that it is at least legally proper to provide the
22 jury with the ability to apportion without providing the name
23 specifically of the company?

24 MR. RICHARD: Yeah. The instruction, Your Honor,
03:11PM 25 says name or description. So Your Honor is getting at you need

1 to sufficiently describe, you know, what that other source is.
2 But the -- so far this is an instruction that the evidence does
3 not support.

03:11PM 4 So I don't know how Mr. Hokkanen, since he relied
5 on Mr. Shoup, the historian, can now go beyond his report and
6 deposition to say, well, I meant to rely on someone else who is
7 more reliable. We will wait to see, but I think --

03:11PM 8 THE COURT: We're not going to wait to see. I'm
9 going to hear something very specific from Mr. Blum right now
10 or he's not going to be permitted.

11 MR. BLUM: Your Honor, Mr. Hokkanen in his report
12 discussed the -- and in his deposition -- discussed the mall
13 wells and the DW wells that they were being drawn into V-201.
14 He also discussed the fact there is a source of PCE for -- that
03:12PM 15 we talked about for the -- for the Saugus wells that has not
16 been identified. These are all things he discussed.

17 What you ruled upon was his general statements
18 that VOCs could be the result of unknown -- generally unknown
19 dry cleaners and all of those things, and you ruled that he
03:12PM 20 couldn't -- that that was impermissible.

21 He's going to be very specific, and he's going to
22 relate to things that were disclosed and were part of his --
23 and there was an opportunity to depose him on.

24 THE COURT: And tell me very specifically.

03:12PM 25 MR. BLUM: Mall wells. He may not have used the

1 words AL-6, but it's basically those wells. The PCE found -- I
2 believe it's in Saugus 2. And I believe, although I'm not
3 positive, the DCE issue that we talked about. Those are all
4 things that were brought up.

03:13PM

5 THE COURT: And he's going to say what with
6 respect to those wells?

03:13PM

7 MR. BLUM: All of those, the -- the mall wells
8 were not us, and they were -- they had an effect of
9 contaminating V-201. He's going to say that the source of PCE
10 that was drawn into -- I believe it's Saugus 2 -- was not us
11 and it was not SIC but it was some unknown source. And he's
12 going to say that the fact that you have DCE and it's not from
13 either site means there is another source of VOCs there because
14 there's got to be some way it got there. That's just common
15 sense.

03:13PM

16 THE COURT: Is Mr. Hokkanen going to acknowledge
17 that Whittaker is responsible for any VOC contamination of any
18 supply well or production well?

03:14PM

19 MR. BLUM: Not of the four we're dealing with,
20 Your Honor. He will say that it's not us based on the
21 groundwater data.

22 THE COURT: So how does that then lead to it was
23 fill in the blank?

03:14PM

24 MR. BLUM: Well, Your Honor, the jury doesn't
25 have to believe -- it's not -- Mr. Hokkanen is going to rely on

1 the groundwater data. So it's -- it's not speculation. It's
2 the data itself that he will rely upon. The jury doesn't have
3 to believe either side. In a sense, either side is arguing an
4 all or nothing position. The jury is able to believe that, you
03:14PM 5 know, Whittaker was a source but an infinitesimal source or
6 Whittaker is a source of the TCE but not the PCE.

7 They're able to reach any conclusion they want
8 based on the evidence. They don't have to believe Mr. Hokkanen
9 100 percent, and they can also not believe Mr. Trudell --

03:15PM 10 Dr. Trudell or Ms. Stanin 100 percent.

11 So the fact that we each take an absolutist
12 position doesn't mean the jury has to.

13 THE COURT: Certainly not, nor can they throw
14 darts up against a wall and try to determine what percentage
03:15PM 15 allocation to give to an undescribed or unidentified
16 contributor, can they?

17 MR. BLUM: Well, it depends what you mean by
18 "unidentified." We do not know who supplied the contamination
19 for the mall wells or the DW wells, but it's not unidentified.
03:15PM 20 It's identified with a lot of particularity. We know exactly
21 where they are. We know what is in it. And there is evidence
22 as to what the impact was. That's more than you have for a lot
23 of actual defendants.

24 THE COURT: So who did it? Who contributed it?

03:15PM 25 MR. BLUM: Again, it's an unidentified party that

1 we are describing with precision.

2 THE COURT: And "with precision" means what?

3 MR. BLUM: Where it is, how much of it is there,
4 and what the impact is.

03:16PM

5 THE COURT: And is that because Mr. Hokkanen is
6 saying it couldn't have been Whittaker and it couldn't have
7 been SIC?

03:16PM

8 MR. BLUM: Well, Dr. Trudell also says it
9 couldn't be Whittaker, so it's not just Mr. Hokkanen. So we
10 have two experts saying it wasn't Whittaker, it was another
11 source.

03:16PM

12 So if the issue is not whether there is evidence
13 that it's not Whittaker because there is already and there will
14 be more after tomorrow. The issue is whether or not -- since
15 knowing it's not Whittaker, whether or not the jury can
16 consider it.

17 THE COURT: All right. Here's what I'm going to
18 require. Mr. Richard, if you want to say something further, I
19 may invite further argument on this after I hear the evidence.

03:16PM

20 MR. RICHARD: I was just going to -- as a
21 practical matter, we may be experiencing opinion creep, and it
22 would be helpful for us if we have the actual page that
23 Mr. Blum believes these opinions were expressed, not the
24 penumbra, but -- so that I can go look at page 2 or 3.

03:17PM

25 THE COURT: I'm going to order that you meet and

1 confer when we're done, and I'm going to direct Mr. Blum to
2 provide you with the specifics that you are requesting.

3 And I would suggest, Mr. Blum, that you be quite
4 generous in speaking with him and providing him with the
03:17PM 5 information that he is requesting.

6 MR. BLUM: Not a problem, Your Honor.

7 THE COURT: And then, Mr. Blum, you can provide
8 the Court with the specifics in the instruction that you are
9 requesting. And you can also provide the Court with citations
03:17PM 10 to the evidence and offers of proof as to what the evidence is
11 going to be that will support this instruction. And what I
12 will do is I will give you -- when is Mr. Hokkanen expected to
13 testify?

14 MR. BLUM: Right after Mr. Leserman. Tomorrow,
03:17PM 15 Your Honor.

16 THE COURT: All right. And how much time do you
17 anticipate with Mr. Hokkanen?

18 MR. BLUM: My goal is 45 minutes to an hour for
19 the direct.

03:18PM 20 THE COURT: All right. And so what I will do is
21 I will give you until -- is it unrealistic to give you till the
22 end of the day tomorrow or maybe the beginning of Wednesday?
23 I'm just trying to thread a needle here because I don't know
24 exactly when I'm going to need to be prepared to instruct.

03:18PM 25 MR. BLUM: If you give me until -- tomorrow is

1 Tuesday?

2 THE COURT: Yes.

3 MR. BLUM: Sorry, Your Honor. If you give me
4 until Wednesday morning, I can get that done.

03:18PM 5 THE COURT: That should be sufficient.

6 You will have an opportunity, Mr. Richard, to
7 respond. I don't know that you will have it in writing;
8 although, you're free to. You get it Wednesday morning, you
9 want to provide something in writing, do so. Otherwise, I will
03:18PM 10 give you an opportunity at least orally before I submit it to
11 the jury.

12 All right. This has been helpful to the Court.
13 I think it's as far as I can take this issue at this point.
14 Let me move on to a couple other instructions.

03:19PM 15 Mr. Richard, this one is for you on the abatable
16 nuisance. Is there anything left at this point? It seems to
17 me that with Mr. Blum's withdrawal of the statute of
18 limitations defense, that there really isn't an issue for the
19 jury to decide about whether the nuisance is abatable and
03:19PM 20 instruct the Court that perhaps that you were confusing the
21 idea of reasonableness with something being abatable. And the
22 jury is going to be instructed on issues concerning factors
23 with regard to reasonableness.

24 MR. RICHARD: Is there a number? Let's see.

03:20PM 25 THE COURT: Yes. It's plaintiff's Instruction

1 No. 39.

2 MR. RICHARD: My notes show we withdrew it, so we
3 might be in vigorous agreement.

4 THE COURT: So this is withdrawn?

03:20PM

5 MR. RICHARD: I'm just double-checking our
6 copies.

7 It is withdrawn.

03:20PM

8 THE COURT: All right. And then defendant's
9 proposed Instruction No. 29 on custom and practice. Just so
10 that the issue is framed correctly, my understanding, Mr. Blum,
11 is that your objection will rise or fall depending upon the
12 Court's determination regarding negligence per se. So if I --
13 if I exclude the negligence per se instruction, this issue goes
14 away. The Court is not going to include the language about
15 custom or practice having no bearing on liability for
16 negligence per se.

03:21PM

17 Conversely, if the Court allows negligence
18 per se, then you would effectively withdraw your objection to
19 this particular instruction while preserving your overall
20 objection about negligence per se. This is defendant's
21 proposed Instruction No. 29.

03:21PM

22 MR. BLUM: Your Honor, just give me a second,
23 please.

24 THE COURT: Yes.

03:22PM

25 MR. BLUM: Your Honor, my concern is that -- I

1 generally agree with you on the state of the law. They have a
2 cause of action in the special verdict form, both for regular
3 negligence and for negligence per se. So even if negligence
4 per se is there, the custom and practice is relevant to the
03:22PM 5 plain -- to the 100 percent negligence claim. So that's my
6 concern here.

7 THE COURT: I may not be following.

8 So the proposed sentence in the custom and
9 practice instruction that's in dispute is as follows -- and I
03:22PM 10 quote -- "Custom or practice has no bearing on liability for
11 negligence per se." And so my understanding is you don't want
12 that in there because you believe negligence per se should not
13 be in the instruction.

14 MR. BLUM: Yes.

03:23PM 15 THE COURT: And all I'm saying is this issue
16 rises or falls on the Court's determination about whether
17 negligence per se goes to the jury.

18 MR. BLUM: Yes, sir.

19 THE COURT: All right. Thank you.

03:23PM 20 And actually, why don't you stay up there because
21 the next instruction is for you that I want to address and that
22 is defendant's proposed Instruction No. 30, which is following
23 U.S. direction.

24 You're not offering this for Government
03:23PM 25 contractor defense but still say that this is relevant, and I'm

1 not following its relevance.

2 I will read it for you. "A violation of a law is
3 excused if Whittaker proves that the violation was caused by
4 Whittaker following the instructions of the U.S. Government for
03:23PM 5 whom it was manufacturing air-to-air missiles and other
6 armaments exclusively for the United States military from
7 approximately 1964 to 1986."

8 So how is that relevant to anything other than
9 the Government contractor defense, for which you're not
03:24PM 10 offering it?

11 MR. BLUM: Could I consult with co-counsel for a
12 moment?

13 THE COURT: Yes.

14 MR. BLUM: Your Honor, I thought that was
03:24PM 15 withdrawn.

16 THE COURT: I don't have it as withdrawn, but
17 that's fine. I will indicate that Whittaker has withdrawn it.
18 So that resolves the issue.

19 I did not come back to the issue that I said I
03:24PM 20 would return to related to apportionment and that is the
21 consequence of the SIC settlement in this matter. And this is
22 plaintiff's proposed Instruction No. 43 and defendant's
23 proposed Instruction No. 44.

24 I realize the parties were following up on the
03:25PM 25 Court's suggestion that, if there was an issue concerning how

1 the jury might construe or evaluate evidence of the SIC
2 settlement, that perhaps that could be addressed by way of an
3 instruction that essentially told them, as I had contemplated
4 it, that the jury need not consider the fact of settlement
03:25PM 5 itself but, rather, the jury may consider SIC's potential
6 liability solely for purposes of the apportionment analysis or
7 words to that effect.

8 That, of course, was before I heard the evidence,
9 and the evidence is not yet all in. But the parties are
03:26PM 10 fighting over now burden of proof and the like and making this
11 more complicated than the Court had anticipated.

12 So my first threshold question is: Is it
13 necessary to have an instruction, given the evidence thus far,
14 for the plaintiff?

03:26PM 15 MR. RICHARD: No, Your Honor. Obviously,
16 instructions not supported by the evidence should not be given.
17 And so far, this falls into that category.

18 THE COURT: Mr. Blum?

19 MR. BLUM: Your Honor, I don't believe it's
03:26PM 20 necessary but for a different reason. There is no evidence we
21 have on SIC settlement.

22 THE COURT: That was my general sense, is either
23 we have not had the evidence or it's been so incidental that
24 this instruction would probably just call attention to an issue
03:27PM 25 that the jury would otherwise not take into account.

1 But whatever the reason, the parties are both
2 agreeing to withdraw their respective instructions, as I
3 understand it. Plaintiff's proposed Instruction 43 is
4 withdrawn; correct, Mr. Richard?

03:27PM

5 MR. RICHARD: Well, the evidence isn't closed. I
6 don't know what they're going to ask their witnesses,
7 Your Honor. But if the evidence doesn't change on the issue,
8 then it's withdrawn. If we're surprised, then we will revisit.

9 THE COURT: Understood.

03:27PM

10 Same for you, Mr. Blum?

11 MR. BLUM: We don't intend to introduce it. But
12 if it comes in by accident -- that's the only way, and I don't
13 think it will -- but no, we don't think it's necessary.

14 THE COURT: So this is going to be the state of
03:27PM 15 the record. Both parties are withdrawing their respective
16 instruction on this, so plaintiff's proposed Instruction 43 and
17 defendant's proposed Instruction 44. That is, of course,
18 without prejudice to the party who believes that the issue has
19 appeared subsequent to the Court's settling of this instruction
03:28PM 20 requires revisiting.

21 Absent this being raised, Mr. Richard, either by
22 you or by you, Mr. Blum, that will be the state of the record,
23 that these instructions have been withdrawn and are not going
24 to be given.

03:28PM

25 Let me see if there's anything else that we can

1 profitably address.

2 I believe all that remains, then, is successor
3 liability. And all that needs to be done is providing the
4 Court with the agreed-upon language.

03:28PM

5 The Court still has to decide the negligence
6 per se issue, and I will await receipt of plaintiff's papers.
7 The abatable nuisance issue has been withdrawn. The Court
8 still needs to decide the apportionment issue; although, we
9 have now, in my view, narrowed this down. Everyone appears to

03:29PM

10 agree on the legal principle. The only question is whether
11 there is going to be sufficient evidence to allow for
12 additional potential tortfeasors. The custom and practice
13 add-on will go the way of the negligence per se ruling. The
14 defense Instruction No. 30 on following U.S. direction has been
15 withdrawn. And the competing instructions about the SIC
16 settlement instructions, No. 43 for the plaintiff -- or
17 Instruction No. 43 for the plaintiff and No. 44 for the defense
18 have been withdrawn.

03:29PM

19 Has the Court omitted any disputed instructions,
20 Mr. Richard?

03:30PM

21 MR. RICHARD: There is at least one, maybe more
22 of defendant's proposed instructions that I cannot tell the
23 Court have been withdrawn. They have a long instruction,
24 proposed Instruction No. 60 on appropriative rights and
25 groundwater and a host of things that are not appropriate for

03:30PM

1 the jury. So that one is outstanding.

2 I'd have to check my notes. I know we are
3 briefing a couple others. I believe we are submitting a brief
4 on negligence per se as well as restoration damages.

03:30PM 5 THE COURT: Well, let's do this, since it's
6 getting late and you will probably want to review your --
7 review the record on this.

8 The parties should meet and confer and just
9 provide me with a list that you should send to the Court's
03:30PM 10 chambers e-mail by the end of today. It can even be this
11 evening so that I have it first thing tomorrow morning. And
12 it's just a list of outstanding jury instructions so that the
13 Court doesn't miss anything. This should be based upon what
14 already has been presented in the record is what I have in
03:31PM 15 mind.

16 The parties do not intend to introduce further
17 instructions, at least based upon what you know thus far in
18 terms of the state of the record.

19 Is that true for you, Mr. Richard?

03:31PM 20 MR. RICHARD: No new instructions. I'm reviewing
21 the wording of a couple that have been submitted based on the
22 evidence.

23 THE COURT: All right. Well, you will put that
24 on the list.

03:31PM 25 Mr. Blum, is that also true for you?

1 MR. BLUM: No, it's not, Your Honor. We have --
2 after the testimony today, we intend to submit a jury
3 instruction on the statute of limitations for negligence and
4 ask the Court to amend the answer to proof.

03:32PM

5 THE COURT: This is the statute of limitations.
6 Have you previously withdrawn this particular --

7 MR. BLUM: We had withdrawn it, and -- but we
8 believe that the -- but we believe we can conform to proof. We
9 had anticipated that this would happen, and we notified
10 plaintiff three months -- two months ago that, if the evidence
11 supported it, we would move to conform. And now we believe the
12 evidence supports it.

03:32PM

13 THE COURT: And what is the evidence that you're
14 referring to?

03:32PM

15 MR. BLUM: That the plaintiffs knew about the
16 risks of perchlorate more than three years prior to the date
17 the first Complaint was filed.

18 THE COURT: All right. You can propose the
19 instruction. And you are to -- have you drafted the
20 instruction and sent it over to Mr. Richard?

03:32PM

21 MR. BLUM: Your Honor, the instruction is the
22 standard CACI. What I wanted to do is go back today and check
23 my notes to make sure we dotted the i's and crossed the t's
24 because I don't want to submit it if we're wrong.

03:33PM

25 THE COURT: Mr. Richard?

1 MR. RICHARD: Yes. When he raised this issue
2 three months ago, I pointed out the law that motions to conform
3 to proof -- I think Rule 15 -- he can't meet the requirements.
4 So we would oppose, if that's what they are making now, an oral
03:33PM 5 motion to conform to something they heard today, we oppose
6 that. And I'm happy to brief that.

7 MR. BLUM: Your Honor, I'm not making the motion
8 now, but you asked me what our intent was.

9 THE COURT: All right. That's fine. And I
03:33PM 10 appreciate that. But you're going to have to disclose to
11 Mr. Richard -- you will stay -- after this, you are to meet and
12 confer and tell him whether you're going to -- whether you
13 intend to propose that so that he can provide the Court with
14 briefing on it.

03:33PM 15 MR. BLUM: Yes, sir.

16 THE COURT: And to the extent that you intend to
17 propose it, I'm going to want to understand why you withdrew it
18 and why I should allow it.

19 And this is the question that I have, is -- I
03:33PM 20 didn't hear anything today that was likely very surprising that
21 you couldn't have anticipated the possibility of. And so if
22 you're saying that that question can be addressed, then please
23 be prepared to address it to the Court.

24 MR. BLUM: Yes, sir.

03:34PM 25 THE COURT: I don't like the idea, candidly, of

1 we withdraw something, we're putting it back in the case, we're
2 now putting it back, we're withdrawing it. And I'm going to
3 understand why it is that you did that. I specifically went
4 over with you -- and I recall it -- going over -- I told you
03:34PM 5 that I would allow you to reintroduce certain affirmative
6 defenses. We had that discussion. We turned the page on the
7 issue, and now you're turning the page over again.

8 So I'm not going to make a ruling on it. I'm
9 just going to let you know that you're going to need to address
03:34PM 10 that question I have in addition to whatever Mr. Richard is
11 also suggesting.

12 MR. BLUM: Your Honor, that's, frankly, why I
13 would have preferred going over the evidence before I brought
14 it up to the Court.

03:35PM 15 THE COURT: I understand that, and I appreciate
16 your introducing it. To the extent you decide after you review
17 the evidence that you're not proposing it, that's fine. I just
18 am simply giving you the benefit of a concern I'm going to have
19 especially as we get closer to the end, if you're trying to
03:35PM 20 reintroduce things that have been withdrawn. There may be a
21 perfectly good reason for it. I don't know.

22 MR. BLUM: I understand we have an uphill battle.

23 THE COURT: In any event, let's see where we are.
24 With that we are going to conclude for the day. Unless there
03:35PM 25 is anything further that the parties needed to address, you

1 will be ordered back here at 8:00 o'clock tomorrow morning.

2 MR. BLUM: Your Honor, may I bring up one quick
3 issue?

4 THE COURT: Yes.

03:35PM 5 MR. BLUM: Your Honor, going over my notes with
6 Mr. Leserman, I neglected to ask him about one exhibit,
7 Exhibit 1419.

8 THE COURT: So you're requesting to reopen for
9 that purpose?

03:35PM 10 MR. BLUM: I don't need any more than five
11 minutes.

12 THE COURT: I will hear from you, Mr. Gee, but
13 I'm usually in the habit of allowing parties to reopen unless I
14 see prejudice.

03:36PM 15 MR. GEE: No objection, Your Honor. We haven't
16 started our cross.

17 THE COURT: You will be allowed.

18 MR. BLUM: Thank you, Your Honor.

19 THE COURT: Anything -- any other issues that the
03:36PM 20 Court needs to focus on before we start tomorrow at
21 8:00 o'clock?

22 MR. RICHARD: I don't think so, Your Honor.

23 THE COURT: Are there going to be any exhibit
24 issues or the like that the Court needs to address? If there
03:36PM 25 are no issues, I will have you come back at 8:30.

1 I also am just recalling now that I have a couple
2 of criminal matters. So the earliest I'm going to be done is
3 going to be by 8:15.

4 Let's leave it this way. The parties are ordered
03:36PM 5 back here at -- let's make it at 8:15. I'm not positive I will
6 be done by 8:15 but possibly. Send me, if there are issues
7 that are outstanding for the Court to consider so that you can
8 proceed tomorrow without any type of interruption, let me know
9 that as well. I'm not inviting new issues. If there are
03:37PM 10 other -- if there are outstanding issues that I have not yet
11 adjudicated, please.

12 MR. BLUM: Your Honor, there is one issue I know
13 that might come up, and that is I believe --

14 THE COURT: Speak into the microphone, please.

03:37PM 15 MR. BLUM: Your Honor, I believe as to the
16 deposition transcript for Ms. Durant, I believe there are three
17 to four objections that both parties have made.

18 THE COURT: Do I have the designations like I did
19 with John Peloquin?

03:37PM 20 MR. BLUM: I believe you do, Your Honor.

21 THE COURT: All right.

22 MR. BLUM: I will submit it with your clerk to
23 make sure.

24 THE COURT: Please do, and I will make sure I
03:37PM 25 look at it this evening.

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We are off the record.

(Proceedings concluded at 3:37 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, MIRANDA ALGORRI, FEDERAL OFFICIAL REALTIME
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DATED THIS 29TH DAY OF NOVEMBER, 2021.

/S/ MIRANDA ALGORRI

MIRANDA ALGORRI, CSR NO. 12743, CRR
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